by recognizing "the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474-75 (reviewing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), *Ex parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946)).

Accordingly, this Court directed the federal courts to proceed to the merits of *habeas* petitions filed by Guantánamo detainees. This Court has held that "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of *habeas corpus*," *Harris*, 394 U.S. at 292, and has recognized that ordering a remedy in cases implicating the Executive's powers to regulate foreign policy "will often call for difficult judgments," *see Zadvydas* v. *Davis*, 533 U.S. 678, 700-01 (2001). Yet, rather than adhere to these principles and accept the challenge of full adjudication, the district court simply wrote the judicial branch out of the constitutional scheme.

The district court's decision not only is clearly erroneous, but also very dangerous in its practical effect. Despite this Court's decision rendered almost two years ago, *amici's* efforts to vindicate their potentially meritorious legal and factual claims have been stymied, as the lower courts' processing of their cases has grown entangled in a legal morass.[2] *Cf. Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) (granting *certiorari* before judgment because issue of constitutionality of sentencing guidelines had "imperative public importance" and was causing "disarray among the Federal District Courts"). This Court should

[2] The fact that Petitioners' appeal is now proceeding before the Court of Appeals does nothing to improve this situation. Any ruling by the Court of Appeals will inevitably be the subject of a challenge here. In the meantime, the cases of the hundreds of *amici* submitting this brief will continue at a standstill as long as it remains undecided whether the federal courts can order the release of unlawfully detained persons.

grant *certiorari* before judgment to resolve the federal courts' apparent confusion about the intended application of *Rasul*.

### C. The District Court's Decision Undermines This Court's Manifest Concern About The Continued Imprisonment Of Innocent Men At Guantánamo.

This Court was particularly disturbed in *Rasul* about the plight of detainees who are factually innocent of wrongdoing or wrongly classified as "enemy combatants." Such individuals, this Court wrote, "unquestionably" are entitled to relief under the *habeas* statute:

> Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to ccunsel and without being charged with any wrongdoing – unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'

*Rasul*, 542 U.S. at 483 n.15 (citing 28 U.S.C. § 2241(c)(3)); *see also id.* at 476 (distinguishing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), on the grounds that Guantánamo prisoners "are not nationals of countries at war with the United States and deny that they have engaged in or plotted acts of aggression against the United States" and "have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing"); *Rasul*, 542 U.S. at 485 (ordering district courts "to consider in the first instance the merits of petitioners' claims" that they are "wholly innocent of wrongdoing"); *Hamdi*, 542 U.S. at 530 (recognizing that the "risk of erroneous deprivation" of liberty through "mistaken military detentions" is "significant").

Petitioners are far from the only innocent non-combatants languishing at Guantánamo. The U.S. military concedes that at least seven other detainees imprisoned at Guantánamo are not "enemy combatants."[3] Moreover, many *amici* believe that any fair review system will show that they too are non-combatants and "wholly innocent of wrongdoing." *Rasul*, 542 U.S. at 484. For example, *amicus* Murat Kurnaz, a 23-year-old Turkish national commencing his fifth year of imprisonment, is detained largely on the claim that his friend "engaged in a suicide bombing" long after Mr. Kurnaz arrived in Guantánamo. *See In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d 443, 470 (D.D.C. 2005). Not only is the claim factually preposterous – the friend in question is alive and well and under no suspicion by relevant authorities of committing any such act – but Mr. Kurnaz's complete file also demonstrates that the U.S. military itself recognizes that he has no connections with any terrorist organization.[4]

In addition, cases of mistaken identity are routine at Guantánamo. Detainee 581 was seized from his village in Pakistan and accused of being Abdur Rahman Zahid, a former Taliban deputy foreign minister suspected of murdering Afghans and looting antiquities. But, the detainee said his name was actually Abdur *Sayed* Rahman, not Abdur *Rahman* Zahid, and that he was "only a chicken farmer in Pakistan."[5] There is no evidence or

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[3] Seven of these detainees have *habeas* petitions pending in the federal courts. *See El-Mashad, et al.* v. *Bush*, No. 05-0270 (D.D.C.); *Kiyemba* v. *Bush*, No. 05-1509 (D.D.C.); *Mamet, et al.* v. *Bush*, No. 05-1886 (D.D.C.); *Zakirjan* v. *Bush*, No. 05-2053 (D.D.C.); *Boucetta* v. *Bush*, No. 05-2087 (D.D.C.). All seven of these detainees are *amici* here. *See* Appendix A.

[4] *See* Carol D. Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A1.

[5] Department of Defense, Reprocessed Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents,

(Continued on following page)

suggestion that he engaged in any violent act. Many detainees, like Detainee 919, an Afghan named Faiz, apparently were presented to U.S. forces as a result of local grievances. Faiz testified that he was actually attempting to recover stolen land deeds stolen *from* the Taliban when a local official involved in the land deal accused him of Taliban membership.[6] According to Faiz:

> My hands are farmer's hands, marked by sickles . . . I wasn't a big person. I didn't have that power. You think about it yourself. When [the Taliban] beat us, they took our land. If the Americans hadn't come, they would have killed us all.[7]

Detainee 963, a farmer, was riding a tractor to town to buy motor oil when he pulled over to allow a U.S. convoy to pass. He wore no uniform and had no weapon; yet "[n]ow I am here for two years and nobody knows why." He is not alleged to have engaged in any violent act.[8] For Detainee 339, a Saudi, the allegation against him appears to be that he spent time in a Taliban guesthouse.[9] He was found, as Brigadier General Martin Lucenti has said about the majority of the detainees, running – not fighting.[10]

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http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html (Mar. 3, 2006) [hereinafter "DOD Documents"], Set 3 at 00272-94.

[6] DOD Documents, Set 31 at 2172-81.

[7] *Id.* at 2175.

[8] DOD Documents, Set 27 at 01901-13.

[9] DOD Documents, Set 21 at 01645-88; *see also* Tim Golden, *Voices Baffled, Brash, and Irate at Guantanamo*, N.Y. TIMES, Mar. 7, 2005, at A10 (describing testimony of many Guatánamo detainees recently made public); Andrew Selsky, *Varied Tales Emerge from Guantanamo Files*, ASSOCIATED PRESS, Mar. 4, 2006.

[10] *See* Mark Huband, *US Officer Predicts Guantanamo Releases*, FIN. TIMES, Oct. 5, 2004 (stating that "[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren't fighting. They were running"), *available at* http://news.ft.com/

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U.S. military officials repeatedly have corroborated *amici*'s claims of innocence. A 2002 CIA report concluded that "a substantial number of the detainees appeared to be either low-level militants . . . or simply innocents in the wrong place at the wrong time."[11] An active duty intelligence officer assigned to Guantánamo agreed that "the United States is holding dozens of prisoners at the U.S. Navy Base at Guantanamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a large number of people at Guantanamo who shouldn't be there."[12]

Indeed, a recent, comprehensive analysis of documents released by the Department of Defense reveals in stark statistical terms that a great number of detainees may be incarcerated unjustly at Guantánamo.[13] According to this review, an astounding 86 percent of detainees were arrested and delivered to U.S. custody by Pakistan or the Northern Alliance after the military offered large financial bounties for

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cms/s/192851d2-163b-11d9-b835-00000e2511c8.html; John Mintz, *Most at Guantanamo to Be Freed or Sent Home, Officer Says*, WASH. POST, Oct. 6, 2004, at A16.

[11] *See also* Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, Jun. 21, 2004, at A01 (reporting that "[o]fficials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantanamo was flawed").

[12] Samara Kalk Derby, *How Expert Gets Detainees to Talk*, The Cap. Times & WIS. ST. JOURNAL, Aug. 16, 2004, at 1A; *Frontline: Son of Al Qaeda* (PBS television broadcast, Apr. 11, 2004), transcript, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html (quoting CIA operative who spent a year undercover at Guantanamo as estimating that "there's only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here").

[13] Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall University School of Law (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

the capture of Arab terrorists.[14] The government's own evidence reveals that a vast majority of detainees never participated in any "hostile act" against the United States or its allies, but are detained because of a varyingly loose "association with" one of 72 groups the military has asserted have some unspecified connection to al Qaeda.[15] According to the Department of Defense, only eight percent of detainees are believed to be al Qaeda fighters;[16] many are detained simply because they wore Casio watches or olive drab clothing.[17]

*Amici*, many of whom believe that they will be able to demonstrate their innocence if provided a fair opportunity to do so, thus share Petitioners' grave concern that the decision below impermissibly perpetuates a system that "allows friends and foes alike to remain in detention." *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

## II. THIS COURT'S IMMEDIATE INTERVENTION IS REQUIRED BECAUSE FURTHER DELAY IN IMPLEMENTING *RASUL* THREATENS THE LIVES AND DENIGRATES THE HUMANITY OF MANY DETAINEES AT GUANTÁNAMO.

*Amici* recognize that, regardless of how deeply misguided the decision below may be, the grant of *certiorari* before judgment is an extraordinary remedy. This, however, is an extraordinary case.

In place of the judicial review promised by *Rasul* nearly two years ago, brutality and lawlessness predominate at Guantánamo. The conditions of confinement and interrogation are designed to produce disorientation and despair among detainees. Among other things, U.S.

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[14] *Id.* at 2-3.

[15] *Id.* at 4, 17.

[16] *Id.*

[17] *Id.* at 20.

military interrogators continually tell many *amici* that the law and lawyers are of no use to them[18] and that they will never be released. The district court's refusal to order the release of Petitioners, who are concededly innocent men, reinforces these lies and will deepen the widespread despair that has already driven hundreds of detainees to life-threatening hunger strikes and repeated suicide attempts.

### A. Abusive Conditions And Treatment Have Prevailed At Guantánamo For Over Four Years.

A variety of outside observers, including the International Committee of the Red Cross ("ICRC"),[19] the Federal Bureau of Investigation ("FBI"),[20] and the United Nations ("UN"),[21] have concluded that tactics frequently employed by many personnel at Guantánamo are tantamount to torture and seriously have compromised the health of hundreds of detainees. Techniques officially approved for use at Guantánamo include isolation for up to thirty days; 28-hour interrogations; extreme and prolonged stress

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[18] *See* Neil A. Lewis, *U.S. Eroding Inmates' Trust at Cuba Base, Lawyers Say*, N.Y. TIMES, Mar. 8, 2005, at A18 (reporting that interrogators try to convince detainees not to trust lawyers by telling them that the lawyers are Jews and by posing as lawyers during interrogations).

[19] *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

[20] United States Department of State, *Charges of Guantánamo Detainee Torture Unfounded, General Says*, State Dep't Press Releases & Documents, Jul. 14, 2005, *available at* http://usinfo.state.gov/dhr/Archive/2005/Jul/15-641403.html (reporting that Defense Department investigation into torture at Guantánamo was "a result of more than two-dozen e-mails from FBI personnel alleging mistreatment of detainees in the second half of 2002" and that "the FBI e-mails contained a reference to 'torture techniques' in Guantánamo").

[21] *See also* United Nations Commission on Human Rights, *situation of detainees at Guantánamo Bay*, Feb. 15, 2005, *available at* http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf (hereinafter "UN Report").

positions; sleep deprivation; sensory assault; deprivation of clothing; hooding; and the abusive use of dogs.[22]

The ICRC, whose investigative team spent most of June 2004 at Guantánamo, reported that "investigators had found a system devised to break the will of the prisoners at Guantánamo . . . through 'humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.'"[23] The UN Special Rapporteur on Torture concluded that interrogation techniques used at Guantánamo, "in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. . . . [T]he simultaneous use of these techniques is even more likely to amount to torture."[24] Indeed, government officials acknowledge that psychologists and psychiatrists working in "Behavioral Science Consultation Teams" have conducted a remarkable "experiment" at Guantánamo.[25] According to an "affiliate" of this program, these teams have sought to "reverse-engineer" torture and interrogation techniques that the military trains U.S. forces to withstand, in order to create the "radical uncertainty" necessary to "break" the detainees.[26]

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[22] *See* Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), *reprinted in* THE TORTURE PAPERS at 340-43 (Karen J. Greenberg, et al. eds., 2005); Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense (Nov. 27, 2002), *reprinted in* THE TORTURE PAPERS, *supra*, at 237.

[23] Lewis, *Red Cross*, *supra* note 19.

[24] UN Report, *supra* note 21, at 25.

[25] Jane Mayer, *The Experiment*, THE NEW YORKER, July 11 & 18, 2005, at 63.

[26] *Id.*

Reports show that physical abuse is routine at Guantánamo.[27] For example, FBI documents reveal that agents witnessed: a female interrogator grab the genitals of a detainee and bend his thumbs back; a detainee gagged with his head wrapped in duct tape;[28] a detainee left in isolation for three months in a cell constantly flooded with bright light, who afterwards showed signs of "extreme psychological trauma;"[29] detainees left chained "hand and foot in a fetal position to the floor, with no chair, food or water," for periods of 24 hours or more;[30] and a detainee left in an unventilated interrogation room with no air conditioning with the temperature "well over 100 degrees."[31]

Another procedure used on many "uncooperative prisoners" involves forcing them to strip to their underwear, shackling them hand and foot to a bolt in the floor, and forcing them to endure strobe lights, painfully loud music, and freezing temperatures, for sessions lasting up

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[27] Beatings are the most frequently reported form of mistreatment among Guantánamo detainees, with no less than 45 *amici* and other detainees represented by counsel alleging that they have experienced physical mistreatment. In a report issued by the U.S. Southern Command, video tapes of the activities of the "Immediate Reaction Force," comparable to a riot squad, revealed questions about abuse and misconduct, and included footage of an IRF guard repeatedly pepper spraying a detainee and taunting him, a guard tying a detainee to a gurney for interrogation, and other physical assaults. *Report: Video Shows Gitmo Abuse* (CBS News television broadcast Feb. 1, 2005), *available at* http://www.cbsnews.com/stories/2005/0204/terror/main671682.shtml.

[28] Paisley Dodds, *Guantánamo Protest: 23 tried suicide*, PHILA. INQUIRER, Jan. 25, 2005, at A02.

[29] Dana Priest and Dan Eggen, *Terror Suspect Alleges Torture*, WASH. POST, Jan. 6, 2005, at A01.

[30] Carol D. Leonnig, *Further Detainee Abuse Alleged Guantánamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A01.

[31] Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, Jan. 6, 2005, at A1.

to fourteen hours.[32] Former interrogators at Guantánamo confirm accounts of "inmates being shackled for hours and left to soil themselves while exposed to blaring music."[33]

Sexual provocation, humiliation, and abuse also have been widely reported and in many cases confirmed by the military.[34] A former army intelligence analyst at Guantánamo has revealed that interrogators systematically use sex to unnerve detainees during interrogation.[35] That account has been confirmed in a report by Physician for Human Rights.[36] Detainees allege that they have been threatened with sexual violence for failure to cooperate with interrogation. *O.K.* v. *Bush*, No. 04-1136 (D.D.C. July 12, 2005) (Mem. Op. denying motions for preliminary injunctions).[37] There are reports of interrogators forcing detainees to look at pornographic videos.[38] Recently released FBI memos report that military interrogators "wrapped terrorism suspects in an Israeli flag and forced them to watch homosexual pornography under strobe lights during interrogation sessions that lasted as long as

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[32] Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, at A1.

[33] Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11. Former military guards, intelligence agents, and others at Guantánamo also report that severe sleep deprivation in connection with interrogations is a common practice. Lewis, *Broad Use of Harsh Tactics*, *supra* note 32.

[34] *See* Carol D. Leonnig and Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantánamo*, WASH. POST, Feb. 10, 2005, at A01.

[35] Mayer, *supra* note 25, at 65.

[36] Physicians for Human Rights, *Break Them Down, Systematic Use of Psychological Torture by U.S. Forces* 10 (2005), *available at* http://www.phrusa.org/research/torture/pdf/psych_torture.pdf (hereinafter "Physicians for Human Rights Report").

[37] A number of detainees allege that guards raped several young prisoners in isolated sections of the prison. Leonnig, *Further Detainee Abuse*, *supra* note 30.

[38] Physicians for Human Rights Report, *supra* note 36, at 11.

18 hours."[39] These abuses are precisely the type documented at Abu Ghraib, the U.S. detention facility administered by Army Major General Geoffrey Miller, in an effort to "Gitmo-ize" the now-notorious Iraqi prison.[40]

Conditions of confinement at Guantánamo also maximize isolation and anxiety, further dehumanizing detainees and undermining their ability to withstand interrogation.[41] Detainees are housed in six-by-eight foot cells[42] and are permitted to leave only for interrogation and one hour of outside exercise per week. Brief for the Guantánamo Detainees at 5-7, *Al Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir. June 10, 2005). Detainees are held virtually *incommunicado*, permitted to receive correspondence only from their attorneys and "the occasional, often heavily censored, letters" from family.[43] Even letters from detainees' young children are censored.[44]

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[39] Drew Brown, *FBI Blasts Interrogators; Memo indicates detainees were clad in Israeli flags and shown porn under strobe lights*, HOUSTON CHRON., Feb. 24, 2006, at A15.

[40] *See* Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASH. POST., July 28, 2005, at A18 (reporting that Army Major General Geoffrey D. Miller stated that he wanted to "Gitmo-ize" Abu Ghraib). *See also See No Evil*, ST. LOUIS POST-DISPATCH, July 15, 2005, at B8 (reporting that Maj. Gen. Miller was assigned to Iraq in September 2003, and "that fall, the military began employing Guantánamo tactics on Abu Ghraib prisoners, using sexual humiliation and working dogs in interrogations").

[41] *See* UN Report, *supra* note 21, at 25 (concluding that conditions of detention "seem to have been used to 'counter resistance' and to cause stress. [And, they are] closely linked with investigation techniques").

[42] Mayer, *supra* note 25, at 60.

[43] Amnesty International, *Guantánamo: Lives Torn Apart – The Impact of Indefinite Detention on Detainees and their Families* (Feb. 6, 2006), *available at* http://web.amnesty.org/library/Index/ENGAMR510072006 (hereinafter "Amnesty Report").

[44] Abdulrahman Fakhri, *US Censoring Letters Written by Children*, GULF DAILY NEWS, Apr. 18, 2005.

### B. Hunger Strikes And Suicide Attempts Are Widespread At Guantánamo.

The brutal detention and interrogation system at Guantánamo, as well as the chronic legal uncertainty that the district court's decision will only perpetuate, has produced the expected outcome: feelings of total hopelessness and desperation that have driven many detainees to repeated attempts to take their own lives.[45] This system, which has developed in place of law at Guantánamo, is perpetuated by the federal courts' failure to vindicate the rights of detainees – including concededly innocent ones such as Petitioners.

Over two years ago, the ICRC warned that prolonged solitary confinement and indefinite detention at Guantánamo inevitably would compromise the mental health of detainees.[46] When the ICRC visited Guantánamo in June 2004, it found high incidences of mental illness produced by stress, particularly attributable to prolonged solitary confinement and often resulting in "self-harm and suicide attempts."[47] The UN Report also found that "conditions [at Guantánamo] have led in some instances to serious mental illness, over 350 acts of self-harm in 2003 alone, individual and mass suicide attempts and widespread, prolonged hunger strikes."[48]

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[45] Psychologists have long known that "the indeterminacy of prison terms, and the absence of any program leading to release from isolation" can lead to a "pervasive . . . hopelessness," and "deep feelings of despair," causing prisoners to resort to "extreme actions, and desperate solutions." Physicians for Human Rights Report, *supra* note 36, at 65-66 (quoting Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent at 18, *Wilkinson v. Austin*, 125 S.Ct. 2384, No. 04-495 (Mar. 3, 2005)).

[46] Lewis, Red Cross, *supra* note 23.

[47] Physicians for Human Rights Report, *supra* note 36, at 10.

[48] UN Report, *supra* note 21, at 31.

In 2005, many detainees waged prolonged hunger strikes at Guantánamo, and dozens were hospitalized.[49] Through their lawyers, many detainees explained that the hunger strike began in the early summer to demand protection under the Geneva Conventions; adequate food, water and medical care; and respect for the detainees' religious observance. *See, e.g.*, Pls.-Pet'rs Mot. for Prelim. Inj., Ex. E (Decl. of Thomas B. Wilner) ¶ 8, *Al Odah* v. *United States*, No. 02-0828 (D.D.C. Oct. 24, 2005) (documenting statements of Saad Al-Azmi). By August, however, it became clear that the hunger strikers believed their situation was hopeless and were "determined to commit suicide to protest their indefinite confinement."[50] One detainee reported to his lawyer that he had lost all faith in the federal courts to stop his indefinite detention. He vowed to "not eat again until he is released or charged" because "the only control he has at Guantánamo is over what he eats . . . " *See* Wilner Decl. ¶ 6, *Al Odah* (recording comments of Mohammed Al Daihani). Another detainee explained the fatalistic motivation for his hunger strike as follows: "I am dying here every day, mentally and physically. This is happening to all of us. We have been ignored . . . I would rather hurry up a process that is going to happen anyway."[51]

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[49] Amnesty Report, *supra* note 43, at 1.

[50] *See* Tim Golden, *Tough U.S. Steps in Hunger Strike at Camp in Cuba*, N.Y. TIMES, Feb. 9, 2006, at A1.

[51] *See* Amnesty Report, *supra* note 43, at 2. One young detainee (a juvenile when captured) was prompted to eat by promises about improved conditions and release, but reinstated his hunger strike in an act of obvious despair when it became clear that the promises were unfounded. *See* Supp. Decl. by Julia Tarver, Esq., ¶¶ 5-6, *Al Joudi* v. *Bush*, No. 05-0301 (D.D.C. Oct. 14, 2005). The renewed hunger strike and the government's brutal forced-feeding have had appalling consequences for this young man. *Id.* ¶ 7 (noting the "emaciated" Al-Sheri "had lost a disturbing amount of weight," had "difficulty speaking because of lesions in his throat that were a result of the involuntary forced-feeding," and "winced in pain" as he talked). His attorney noted

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While the exact number of detainees affected by the crisis is difficult to confirm, the Government has acknowledged that the hunger strike reached an apex of 130 detainees in the fall of 2005.[52] That number has since declined only after remarkably harsh and painful involuntary feedings.[53] In spite of the government's severe response, hunger strikes at Guantánamo are likely to continue.[54]

Ongoing suicide attempts and incidents of self-inflicted harm are further evidence of the acutely unbearable conditions at Guantánamo.[55] One mental health

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in October that he could no longer walk, had lost some of his vision, and vomited every day. *Id.* ¶ 18. Al-Sheri has provided his attorneys with his last will and testament, fully anticipating that he will die at Guantánamo. *Id.*

[52] *See* Golden, *Tough U.S. Steps*, *supra* note 50 (citing information from chief military spokesman at Guantánamo Lt. Col. Jeremy M. Martin). Detainees have reported higher numbers of participants. *See Red Cross Confirms Guantánamo Hunger Strike*, REUTERS, Oct. 7, 2005 (reporting account that 200 of Guantánamo's 500 detainees were striking).

[53] *See* Golden, *Tough U.S. Steps*, *supra* note 50 (noting that guards have placed hunger strikers "in isolation for extended periods" in "uncomfortably cold isolation cells," have denied detainees blankets and books, and have used "anti-riot control soldiers" to restrain detainees during forced-feedings).

[54] Eric Schmitt and Tim Golden, *Force-Feeding at Guantánamo Is Now Acknowledged*, N.Y. TIMES, Feb. 22, 2006, at A6 (reporting that the military commander responsible for the Guantánamo Bay detention center confirmed that officials have turned to more aggressive methods to deter prisoners who were carrying out long-term hunger strikes); Golden, *Tough U.S. Steps*, *supra* note 50 (noting that Guantánamo "has been beset by hunger strikes almost since it was established in January 2002" and that military officials have acknowledged their use of "involuntary feeding" to quash hunger strikes as early as 2002).

[55] As of March 9, 2003, twenty detainee suicide attempts had been reported. Physicians for Human Rights Report, *supra* note 36, at 52 (citing Don Van Natta, Jr., *Questioning Terror Suspects In a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1). Since then, there have been many more, including a mass suicide attempt in August 2003 in

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expert has noted the "extraordinarily high number" of suicide attempts at the camp as "compared with other prison populations."[56] The case of detainee Jumah al-Dossari, a detainee who has attempted suicide nine times between March 2003 and November 16, 2005, is illustrative. *See* Resp'ts Opp'n to Pet'rs Mot. for TRO and Prelim. Inj., Ex. 2 (Decl. of Dr. John S. Edmondson) ¶ 10, *Almurbati* v. *Bush*, No. 05-1227 (D.D.C. Nov. 16, 2005). The government held Mr. al-Dossari in virtual total isolation from May 2004 until very recently and frequently kept him in uncomfortably cold conditions with fluorescent lights glaring 24 hours a day. *See* Colangelo-Bryan Decl. ¶¶ 27-28, *Almurbati*. In arguing that Mr. al-Dossari was not isolated from human contact, the government offered the absurd defense that he was afforded 29 opportunities to "*interact*" with government interrogators. *See* Resp'ts Opp'n to Pet'rs Mot. for TRO and Prelim. Inj. at 6, *Almurbati*.

Mr. al-Dossari recently hung himself and slashed his arm during a break from visiting with his attorney. *See* Mem. of Law in Supp. for a TRO and Prelim. Inj., Ex. B (Decl. of Joshua Colangelo-Bryan, Esq.) ¶¶ 35-38, *Almurbati* (Nov. 4, 2005). He later explained that he tried to kill himself while his attorney was present because if he died without an outside witness, "nobody would have known what happened."[57]

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which 23 detainees attempted to hang themselves. *Mass Guantánamo Suicide Protest*, BBC NEWS, Jan. 25, 2005 (quoting Army spokesman Lt. Col. Sumpter), http://news.bbc.co.uk/2/hi/americas/4204027.stm. In 2004, alone, the army reported 110 incidents of self-harm by detainees at Guantánamo. *Id.* (quoting Lt. Col. Sumpter and Army Gen. Jay Hood).

[56] Van Natta, *Questioning Terror Suspects*, *supra* note 55 (quoting Dr. Terry Kupers, a psychiatrist who has studied mental health in prisons).

[57] *This American Life: Episode 310* (NPR radio broadcast Mar. 12, 2005), *available at* http://www.thisamericanlife.org (interview with Joshua Colangelo-Bryan).

## CONCLUSION

The need for this Court to uphold the rule of law by ordering the implementation of the mandate of *Rasul* is both plain and urgent. *Amici* urge this Court to grant the petition for a writ of *certiorari* before judgment.

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***Kurnaz v. Bush, et al.*,**
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***Alsaaei, et al. v. Bush, et al.*,**
**05-CV-2369 (RWR);**
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* *Amici* are identified by their case docket numbers in the United States District Court for the District of Columbia.

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***Zakaria Al-Baidany and Abdel Aziz Al-Swidi v. Bush, et al.*, 05-CV-2380 (CKK); *Adham Mohammed Ali Awad v. Bush, et al.*, 05-CV-2379 (JR)**

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***Ayoub Haji Mamet, et al. v. Bush, et al.*, 05-CV-01886 (EGS); *Abdur Razakah, et al. v. Bush et al.*, 05-CV-02370 (EGS)**

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***Zakirjan v. Bush, et al.*, 05-CV-2053 (HHK)**

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***Sulaiman Saad Mohaammed Al-Oshan v. Bush, et al.*, 05-CV-00533 (GK)**

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***Fethi Boucetta a/k/a, Dr. Abu Muhammed v. Bush, et al.*, 05-CV-2087 (RMC); *Nabil (Last Name Unknown), et al. v. Bush, et al.*, 05-CV-1504 (RMC); *Abbar Sufian Al Hawary, et al. v. Bush, et al.*, 05-CV-1505 (RMC); *Sufyian Barhoumi, a/k/a Shafiiq, et al. v. Bush, et al.*, 05-CV-1506 (RMC); *Motai Saib, et al. v. Bush, et al.*, 05-CV-1353 (RMC)**

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***Al-Delebany v. Bush, et al.*, 05-CV-02477 (RMU); *Khan, et al. v. Bush, et al.*, 05-CV-02466 (RCL); *Mohammon, et al. v. Bush, et al.*, 05-CV-02384 (RWR); *Al-Halmandy, et al. v. Bush, et al.*, 05-CV-02385 (RMU)**

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***Hussain Salem Mohammed Almerfedi, et al. v. Bush, et al.*, 05-CV-1645 (PLF); *Waleed Saeed Bn Saeed Zaid, et al. v. Bush, et al.*, 05-1645 (JDB)**

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***Ahamed Abdul Aziz, et al. v. Bush, et al.*, 05-CV-0492 (JR); *Mohammed Al-Amin, et al. v. Bush, et al.*, 05-CV-2336 (PLF); *Rabbani, et al. v. Bush, et al.*, 05-01607 (RWR)**

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***Mohammed Rajeb Abu Ghanem, et al. v. Bush, et al.*, 05-CV-1638 (CKK); *Ameen Mohammad Albkri, et al. v. Bush, et al.*, 05-CV-1639 (RBW); *Alla Ali Bin Ali Ahmed, et al. v. Bush, et al.*, 05-CV-1678 (GK)**

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***Hamad Al Razak v. Bush, et al.*, 05-CV-1601 (GK)**

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***Al Salami, et al. v. Bush, et al.*, 05-CV-02452 (PLF); *Alhag v. Bush, et al.*, 05-CV-02199 (HHK)**

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***Rafiq bin Bashir bin Jallul Alhami, Mohammed Abdul Rahman v. Bush, et al.,***
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***Abdullah v. Bush, et al.,***
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***El-Banna v. Bush, et al.*, 04-CV-1144 (RWR)**

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***Ayman Saeed Batarfi v. Bush et al.*, 05-CV-0409 (EGS)**

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***Elham Battayav v. Bush, et al.*, 05-CV-00714 (RBW)**

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***Ziyad Bin Salih Bin Muhammad, Al-Bahooth v. Bush, et al.*, 05-CV-01666 (ESH); *Abdul-Hadi Muhammad Al-Siba'I v. Bush, et al.*, 05-CV-01667 (RBW); *Rashid Awadh Rashid Al-Uwaidah v. Bush, et al.*, 05-CV-01668 (GK); *Fahd Bin Salih Bin Sulaiman Al-Jutaili v. Bush, et al.*, 05-CV-01669 (TFH); *Salim Said et al. v. Bush, et al.*, 05-CV-02384 (RWR);**

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***Mohammad Abdel Rahman Al-Shimrani v. Bush, et al.*, 05-CV-2249 (RMC); *Saleh Zaid Al Khatemi v. Bush, et al.*, 05-CV-2248 (ESH); *Fahd Muhammed Al Fouzan v. Bush, et al.*, 05-CV-02386 (RBW)**

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IN THE

# Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,
*Petitioners*,

v.

GEORGE W. BUSH, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF THE UYGHUR AMERICAN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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## QUESTION PRESENTED

The question presented is whether the District Court, which had jurisdiction over Petitioners' petitions for habeas corpus and determined that Petitioners' continued military detention was unlawful, had the power to craft a remedy to protect Petitioners' liberty interests from further unlawful deprivation.

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## INTRODUCTION

The Uyghur American Association ("UAA") respectfully submit this brief as *amicus curiae* pursuant to Sup. Ct. R. 37.3 in support of Petitioners' application for a writ of certiorari before judgment.[1]

## STATEMENT OF INTEREST

East Turkistan has been under the dominion of the People's Republic of China ("PRC" or "China") and referred to by that government as the Xinjiang Uyghur Autonomous Region since 1949. Uyghurs, a largely Muslim people, have long struggled for cultural recognition and self-determination. UAA represents the Uyghur community located in the United States - - a community of people who left their homeland to seek freedom and opportunities unavailable to them in China. UAA works to preserve the rich, humanistic, and diverse Uyghur culture, and to support the Uyghur people's right to use peaceful and democratic means to determine their own political future.

UAA understands that the Petitioners in this case, Guantanamo Bay detainees from East Turkistan, fled China in an effort to reach a relative haven where they could find work and rebuild their lives - - only to be seized and sold to U.S. military authorities. After years of incommunicado detention, the military has determined that Petitioners are not enemy combatants; yet they remain incarcerated thousands of miles from friends and family and without any foreseeable prospect of release. The District Court found that Petitioners' detention was unlawful, but deemed itself incapable of fashioning a remedy. With respect, UAA believes that the District Court erred. A remedy is not only possible, but obligatory.

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[1] The parties consented in writing to UAA's participation in this case, and their consents have been filed with the Clerk of the Court. No party to this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. Sup. Ct. R. 37.6.

UAA is uniquely situated to offer assistance to the Court and the Executive to fashion a remedy. In the District Court, the Uyghur community and UAA members offered to provide housing, food, clothing, English language training, and gainful employment to Petitioners if they are paroled into the continental United States. UAA submits this brief in part to reaffirm that offer.

## ARGUMENT SUMMARY

This case is about the liberty of two illegally detained men and the efficacy of the Great Writ. The District Court recognized that the continuing detention of Petitioners is both indefinite and unlawful. *Qassim v. Bush*, 407 F. Supp. 2d 198, 201 (D.D.C. 2005). Nevertheless, it found that, due to constitutional "obstacles" that "involve the separation of powers," it could not offer Petitioners any relief. *Id.* at 202. This conclusion fails to vindicate Petitioners' indisputable liberty interests and, if upheld, will eviscerate the habeas remedy they and the other Guantanamo detainees won less than two years ago in the Supreme Court. *Rasul v. Bush*, 542 U.S. 466, 483 (2004).

Uyghurs have endured decades of mistreatment at the hands of the PRC. Their status as a religious and ethnic minority has exposed them to countless indignities, including the targeted dilution of their culture and the denial of their most basic civil, religious, and political rights. Many Uyghurs have fled China, seeking opportunities to rebuild their lives and communities elsewhere. This case concerns two such Uyghurs - - Abu Bakker Qassim and Adel Abdu' al-Hakim - - men who left their homes and families in search of work and freedom. As the District Court noted, "the government has not stated that [Petitioners] were ever suspected of having engaged in armed conflict against the United States." *Qassim*, 407 F. Supp. 2d at 200. Nevertheless, they were seized and detained as "enemy combatants," and were subsequently transported to Guantanamo Bay, Cuba.

Although the Executive now has determined that it was wrong to label these men "enemy combatants," it refuses to release them. Its principal justification for continued detention is the power to "wind up" Petitioners' captivity in a manner satisfactory to the Executive. The District Court rightly rejected this frightening attempt to justify indefinite, unlawful detention. This Court reached the same result 60 years ago when the government made a similar claim to hold an admittedly loyal U.S. citizen of Japanese descent in an internment camp. *See Ex parte Endo*, 323 U.S. 283, 302-04 (1944).

According to the Executive, even if Petitioners are wrongfully detained, the courts cannot order them released. The Executive will not release them to China because, as Uyghurs, they face the prospect of further detention and torture in China. It will not parole them into the continental United States, because, at bottom, it does not want them in the continental United States, and asserts plenary authority to keep them out. The Executive's solution is to let Petitioners sit at Guantanamo Bay indefinitely until another nation consents to take them.

The District Court's failure to order Petitioners' release guts the habeas relief granted in *Rasul* and diverges from centuries of habeas jurisprudence. The Great Writ is a Judicial check on Executive authority to imprison. The remedy it provides is release. Having determined that Petitioners were and are wrongfully detained, the Writ demands that the courts order their release.

Fortunately, this Court need not craft and implement a remedy on its own. UAA is here to help the court fashion an appropriate solution. UAA and its constituents stand willing to take Petitioners in and to help them meet any conditions of release that may be imposed.

## ARGUMENT

### I. PETITIONERS ARE NOT ENEMY COMBATANTS.

#### A. The Uyghur People Have Endured Decades of Discrimination and Brutal Oppression.

Uyghurs have suffered greatly at the hands of the communist government since it came to power in 1949. The State Department annually documents human rights practices in reports that prominently feature the plight of the Uyghur people in China. *See generally Country Reports on Human Rights Practices-2004: China*, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State (Feb. 28, 2005) ("*China Report*").[2] The China Report states that the Uyghur people are subject to increasing, state-sponsored oppression. *Id.* The PRC's conduct reflects an apparent effort to extinguish the Uyghur ethnic, cultural, and religious identity.

The PRC has promoted the steady migration of Han Chinese to East Turkistan on a scale sufficient to dilute the Uyghur majority in the region. The Han population in East Turkistan rose from roughly 300,000 in 1949 to over 8.25 million in 2003, rivaling that of the Uyghur population. In recent decades the Han migration has targeted East Turkistan's capital, Urumqi, where the Han-Uyghur ratio shifted from 20:80 to 80:20. *See id.* at 35.

The steady and calculated Han migration has accompanied a systematic denial of civil, political, and religious freedoms to the native Uyghur population. Economic opportunity is disproportionately distributed along ethnic lines, even to the extent of shipping Han workers to East Turkistan to work on large development projects at the expense of local Uyghur

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[2] These country reports for various countries and years are available on the U.S. State Department worldwide web page at the following address: http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm. Page citations are to the HTML printed version of the report.

labor. *Id.* The China Report notes that "[t]he majority Han Chinese have benefited disproportionately from government programs and economic growth, even in minority areas. Many development programs have disrupted traditional living patterns of minority groups, and have included, in some cases, the forced evacuation of persons." *Id.*

Uyghur participation in the political process is largely illusory and any expression of dissent is potentially dangerous. Ethnic minorities are excluded from positions of real political and economic power; Han officials hold the most powerful Party positions in minority autonomous regions, such as East Turkistan. *Id.* Uyghur political, religious, and economic leaders are targeted for intimidation, incarceration, and execution, based on charges as preposterous as passing "newspaper articles and a list of names of persons whose cases had been handled by the courts." *Id.* at 36. In one of the more recent campaigns to stifle Uyghur dissent, the State Department reported that justice was handed out in the presence of "mass sentencing rallies attended by more than 300,000." *Id.* The PRC is not beyond the forced repatriation and execution of dissenting Uyghurs who have been granted refugee status by the United Nations High Commissioner for Refugees. *Id.*

The Uyghur people are largely Muslim - - a trait that singles them out for further persecution. "Officially sanctioned" mosques are free to operate, *id.* at 21, but "[r]egulations restricting Muslims' religious activity, teaching, and places of worship continued to be implemented forcefully in Xinjiang," *id.* at 23. Religious personnel have been subject to "monthly political study sessions." *Id.* In East Turkistan, mosque building and religious training are restricted, as is the teaching of Islam to children under the age of 18. *Id.* Teachers, professors, and university students are not allowed to practice religion openly. *Id.* at 24. Uyghurs are imprisoned for engaging in non-descript "illegal religious activities," *id.* at 23,